BOOK REVIEWS

The Postal Power of Congress, a Study in Constitutional Expansion. By LINDSAY ROGERS, Ph.D., LL.D., adjunct professor of political science in the University of Virginia. (Baltimore: Johns Hopkins University Studies in Historical and Political Science, Series xxxiv, No. 2. 1916.)

Like the other powers of congress, the postal power has to be studied, in its historical aspect at least, in three relations: first, that determined by the words in which it is granted; second, in relation to the supposed reserved rights of the States; third, in relation to the fundamental rights of individuals, the rights which in this instance are safeguarded by the first and fifth amendments.

One of the best illustrations that we have of the nonsense of which the states-rights metaphysic was capable is furnished by the fact that there came a time when the spokesmen of this school set up the contention that the power to "establish" postroads did not include the power to *construct* them, but only the power "to *select* from those already made those on which there shall be a post," an argument which, as Mr. Rogers suggests, if logically adhered to, would have compelled the national government to select its inferior courts from tribunals already in existence. A more moderate theory accorded the word "establish" its normal meaning, but held that before the national government could construct a road within a State, it must obtain the consent thereof, an idea which seems to have been referred to the "necessary and proper" clause, since, it was argued, "however *necessary* such improvements might be, it might be questioned how far an interference with the State jurisdiction over its soil, against its will, might be proper!" Yet, notwithstanding the wide vogue of such views, particularly after the triumph of the backwoods democracy under Jackson, the proper view of national power in this field was stated as early as 1838 by the supreme tribunal of a southern State. In *Dickey vs. Maysville, etc. Co.* (7 Dana 113), the Kentucky court of appeals defined the word establish as signifying "to found, prepare, make, institute, confirm;" and pronounced the national power over the post to be "exclusive," "plenary," and "supreme," so that "no State can constitutionally do,

or authorize to be done, any act which may frustrate, counteract, or impair the proper and effectual exercise of it by national authority."

The personal rights regarded as claimable against the postal power were, before the Civil War, confined to those safeguarded by the first amendment, but these were construed very broadly indeed. Then when the question arose in 1836 of excluding incendiary matter from the mails, Webster, Clay, and Calhoun all three contended vehemently that any direct effort by the national government to this end would constitute an "abridgement of freedom of speech and the press," though Calhoun thought congress might adopt State legislation dealing with the matter. It remained for Buchanan of Pennsylvania to state what would today be regarded as the more nearly correct view: "From the prohibition to make any law 'abridging the freedom of speech or of the press,' it could never be inferred that we must provide by law for the circulation through the post-office of everything which the press might publish."

What, then, is the limit to congress' power nowadays in excluding published matter from the mails? It is indicative of the general trend of constitutional construction throughout the past generation that Mr. Rogers discusses this question primarily in relation to the fifth amendment rather than the first, and with the parallel of congress' power over commerce in mind. The conclusion he arrives at, he phrases thus: "Any legislation excluding from the mails must apply to the *things* mailed, not to the *persons* using the mails. This is a distinction which is evident in the decisions upholding the interstate commerce legislation, and which underlies the argument that congress may exclude commodities manufactured in whole or in part by children. The law would operate directly on these commodities . . . . because of the objectional conditions of employment. And by a parity of reasoning congress could exclude from the mails matter relating to gambling transactions which might be forbidden under the police power of the States . . . . But it is an entirely different proposition absolutely to deny the use of the mails because certain persons have refused to comply with conditions, beyond the power of congress directly to impose, which it thinks may result in regulating objectionable practices, although these may be entirely disassociated from the bulk of the matter which has been excluded," (p. 172).

If the distinction thus offered is a really feasible one, it would seem to condemn the recently enacted child labor law, which excludes from interstate commerce, not the products of child labor as such, but the

products of *establishments* employing child labor. Indeed, the alacrity shown by the sponsers of this legislation may have been due to the belief that it would ultimately succumb to the constitutional test. But if this was the case, these gentlemen may find themselves hoist by their own petard. At any rate, I personally believe the recent legislation to be quite defensible constitutionally, however it may fare by Mr. Rogers' test. For granting that congress may exclude the products of child labor from interstate commerce, it may certainly adopt reasonable measures to make its prohibition effective and enforceable; and if a State may, by way of making its game laws effective, forbid its inhabitants from having in their possession game which was lawfully imported from abroad (*Silz vs. Hersterberg*, 211 U. S.), I see no reason why the product of an establishment employing child labor may not be excluded from commerce among the States. On the other hand, it is apparent, I think, that an act of congress forbidding divorced persons the use of the mails or of the channels of interstate commerce would be void; and the test by which it would be void is this: the use of the facility thus inhibited has nothing to do with the consummation of the evil which is sought to be combatted. But wherever a facility subject to national control is being put to a bad use, it may be withdrawn; and in judging of what *is* "bad," congress must be allowed the same range of judgment as the State enjoys in the exercise of its police power.

Professor Rogers has produced an interesting, well written and thoroughly competent piece of work, which is well up to the high standard set by the series of studies in which it appears.

EDWARD S. CORWIN.

History and Procedure of the House of Representatives. By DEALVA STANWOOD ALEXANDER. (Boston and New York: Houghton Mifflin Company. 1916. Pp. xv, 435).

Professor Redlich in his *Procedure of the House of Commons* demonstrated the importance of legislative procedure for the student of politics who would know the actual operations of governmental machinery. He did this by showing how the rules of procedure of the house of commons reflected the economic, social, and political conditions of England. The book under review, written by one who was for fourteen years a member of congress, does for the house of representatives what Professor Redlich did for the commons, although the two treatises